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In The
Supreme Court of The United States

OCTOBER TERM, 1942

No. 556

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, a Municipal Corporation, ET AL.,
Petitioners,

VERSUS

EVELYN SEBER ET AL.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

Certiorari Granted January 11, 1943

PETITIONERS' BRIEF

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Attorney General of the State of Oklahoma;
HOUSTON E. HILL,
Assistant Attorney General;
NORMAN J. FUTOR,
Assistant Attorney General;
EVERETT S. COLLINS,
County Attorney, Creek County,
Counsel for Petitioners.

February, 1943.

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INDEX

PAGE

I The Opinion of the Court Below 2

II Statement of the Case 2

III Specifications of Error 5

IV Argument in Chief 7

Propositional 1: The Acts of Congress in question are unconstitutional because the Congress of the United States cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or property of an individual merely because such individual is possessed of a quantum of Indian blood 7

Authorities Cited.—

Opinion of the Circuit Court, 130 Fed. (2d) 670 7

Shaw v. Gibson-Zahniser Oil Corporation, 276 U. S. 575, 72 L.ed. 709 ..... 8, 9, 10

Constitution, Art. 1, Sec. 8 8

Tiller v. Atlantic Coast Line Co., 87 S. Ct. No. 8, p. 454 9

Helvering v. Mountain Producers Corp., 303 U. S. 376, 58 S Ct. 623, 82 L.ed. 907 ..... 9, 10, 11

Choate v. Trapp, 224 U. S. 665 12

United States v. Ransome, 263 U. S. 691 14

McCurdy v. United States, 246 U. S. 263 14

United States v. Gray, 284 Fed. 10 14

U. S. v. Mummert, 15 Fed. (2d) 926 14

United States v. Wright, 53 Fed (2d) 300 14

United States v. Swain County, North Carolina, 46 Fed. (2d) 99 14

43 Stat. 376 ..... 14, 15

PAGE

Proposition 2. The Act of Congress of June 20, 1936 (which deals with lands purchased out of an individual Indian's own restricted funds), and the Act of May 19, 1937 (which amends said 1936 Act by limiting it to homesteads), are not applicable to the lands here involved:

1. The Acts apply only to a "landless" Indian who had never held lands prior to the purchase of property for him out of restricted funds; said Acts have no application to an Indian such as Wosey John Deere who was at all times possessed of a Creek allotment and who died on September 2, 1938, possessed of property valued at $359,643 18

Authorities Cited:—

Congressional Record of June 6, 1936, p 9159 19

Opinion of the Circuit Court, 130 Fed. (2d) 682-3-5 20

2. The Act of June 20, 1936 limited tax exemption to ****lands, the TITLE to which is now held by an Indian***, heretofore purchased out of trust or restricted funds of SAID Indian, "and the Act of May 19, 1937, limited the tax exemption to HOMESTEAD lands. Since the land in question was purchased out of the funds of respondents' grantor rather than the funds of respondents', respondents cannot claim tax exemption 21

Authorities Cited:—

Congressional Record (Senator Thomas) 22, 23

Section 2 of the Act of June 20, 1936 22

Majority Opinion of the Circuit Court of Appeals 22

Conclusion 23

In The
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No. 356

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, a Municipal Corporation, ET AL.,
Petitioners,

VERSUS

EVELYN SEBER ET AL.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

Certiorari Granted January 11, 1943

PETITIONERS' BRIEF

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States.

Your petitioners respectfully show:

I.

THE OPINION OF THE COURT BELOW

Petitioners pray for a review of the judgment entered in case No. 2488 in the Circuit Court of Appeals for the Tenth Circuit, on September 2, 1942 (T. 99). A majority opinion (130 Fed. [2d] 663, T. 56), and a minority opinion (130 Fed. [2d] 671, T. 67), were written. No petition for rehearing was filed.

II.

STATEMENT OF THE CASE

This is an action in which the Circuit Court below (with dissenting opinion) permitted respondents to recover ad valorem taxes paid for the years 1937, 1938, 1939 and 1940 on the following described land in Creek County, Oklahoma:

> W½ of SW¼ of Sec. 27-18N-11E; W½ of NW¼ of SW¼ of SW¼, and W½ of E½ of NW¼ of SW¼ of SW¼ of Sec. 36-18N-11N, containing 87½ acres (130 Fed. [2d] 666).

All of the above described lands involved in this action have been continuously on the tax rolls of Creek County, Oklahoma, and the political subdivisions of the county, wherein said lands are located.

The majority opinion of the Circuit Court also upheld a declaratory judgment decreeing the land tax exempt. Although certain additional land was originally involved in the action, the above described land is all that need be considered for the purposes of this petition.

Respondents, as tenants in common, are the owners of said land, having acquired fee simple title thereto by gift on December 10, 1937. On December 16, 1937, respondents designated said land as homestead, under Act of Congress of May 19, 1937. Although respondents happen to be possessed of full Indian blood, they are not enrolled as members of any Indian tribe. Petitioners are public officials of Creek County, Oklahoma.

Respondents' grantor was their mother, Wosey John Deere. She was enrolled opposite Roll No. 9546 of the Creek Tribal Roll. Said land had been purchased for her prior to 1927 out of her restricted funds in the custody of the Secretary of the Interior. Wosey John Deere reserved an interest (life estate) in said land in a conveyance made to respondents on March 4, 1931, but she conveyed said reserved interest to respondents on December 10, 1937. At all times material herein, Wosey John Deere was possessed of a homestead which had been alloted to her by virtue of her tribal enrollment. As was said in the minority opinion (130 Fed. [2d] 682, 683):

> "The Creeks • • • could not properly be denominated landless Indians • • • Lands were allotted to their members • • • Under • • • acts of April 12, 1926, and May 10, 1928, Congress continued in applicable cases not only restrictions, but also non-taxability not exceeding 160 acres, held by an allottee after April 26, 1931. That would cover the original allotted lands of Wosey John Deere • • • ."

Respondents inherited $359,643 from said grantor, Wosey John Deere, who died on September 2, 1938. On the basis

of cases numbered 2558, 2559, 2560, pending in the Circuit Court of Appeals, styled *United States* v. *Oklahoma Tax Commission*, the minority opinion of the Circuit Court said (130 Fed. [2d] 685):

> "The court takes judicial knowledge of the fact that the inherited restricted estate of Wosey John Deere in the custody of the Secretary of Interior on September 2, 1938, amounted to $359,643, and the record shows that these appellants were her heirs * * *."

The majority opinion of the Circuit Court was based upon the following Congressional Acts:

Act of Congress of June 20, 1936 (49 Stat. L. 1542):

> "Sec. 1. * * * There is hereby authorized to be appropriated * * * the sum of $25,000, to be expended * * * for the payment of taxes * * * assessed against individually owned Indian land, the title to which is held subject to restrictions against alienation or encumbrance * * * heretofore purchased out of trust or restricted funds of an Indian, where the Secretary (of Interior) finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be non-taxable * * *.
>
> "Sec. 2. All lands, the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress."

Amendatory Act of Congress of May 19, 1937 (50 Stat. L. 188, 25 U. S. C. A., Sec. 412a (amended Sec. 2 above to read as follows):

"Sec. 2. All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be non-taxable until otherwise directed by Congress: Provided, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; and, provided further, that the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town or city property, not exceeding in cost $5000.00, to be designated as a homestead."

The majority opinion said (130 Fed. [2d] 670):

"The taxable status of all property in Oklahoma is fixed as of January first of each year * * *."

The Act of June 20, 1936, was in force on January 1, 1937, and it was under that Act that the majority opinion permitted recovery of 1937 ad valorem tax.

The Act of May 19, 1937, was in force on January 1, 1938, and respondents had designated the land as homestead on December 16, 1937, and it was under that Act that the majority opinion permitted recovery of 1938, 1939 and 1940 ad valorem tax.

This action involved no disputed questions of fact (See Agreed Statement of Fact, T. 37-46).

III.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in holding that the Acts of Congress in question are constitutional.

2. The Circuit Court of Appeals erred in holding that the Acts of Congress in question are applicable to the land here involved.

a. The court erred in holding that Wosey John Deere (who possessed a Creek allotment at the time the land in question was purchased for her, and whose property was valued at $359,643) was in the category of persons entitled to receive the benefits of Act of Congress of June 20, 1936 (49 Stat. L. 1542).

b. The court erred in holding that respondents (who were possessed of full Indian blood, but were not enrolled in any Indian tribe or possessed of any restricted funds) and who acquired the land in question by gift, were in the category of persons entitled to receive the benefits of Act of Congress of June 20, 1936 (49 Stat. L. 1542), as amended by Act of Congress of May 19, 1937 (50 Stat. L. 188, 25 U. S. C. A., Sec. 412a).

3. The Circuit Court of Appeals erred in holding that—because Wosey John Deere owned an interest in the land in question on January 1, 1937—respondents were entitled to recover ad valorem taxes paid on said land for the year 1937, even though neither Wosey John Deere nor the administrator of her estate were parties to this action.

4. The Circuit Court of Appeals erred in permitting respondents to recover ad valorem taxes which had been paid on the land in question more than three years before the filing of this action, such action being barred by the statute of limitations of the State of Oklahoma.

5. The Circuit Court of Appeals erred in upholding Federal jurisdiction in this action, in view of Section 12665, O. S. 1931, which has the effect of requiring that actions for

the recovery of illegally collected taxes shall be filed in the courts of the State of Oklahoma rather than the Federal courts.

IV.

ARGUMENT IN CHIEF

PROPOSITION 1.

The Acts of Congress in question are unconstitutional because the Congress of the United States cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or propery of an individual merely because such individual is possessed of a quantum of Indian blood.

The majority opinion of the Circuit Court purports to dispose of the constitutional question in the following language (130 Fed. [2d] 670):

> "The exemption granted here is based upon the power of the Federal Government to create a Federal instrumentality out of lands heretofore taxable by the State of Oklahoma, and to immunize them against taxation."

The above statement was made by the court without citation of authority. More serious is the fact that the above statement begs the question. Of course, the Federal Government can—in pursuance of a bona fide constitutional purpose—create a Federal instrumentality, immune from state taxation. But it is the position of the State of Oklahoma that the Federal Government cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or property of an individual merely because such individual is possessed of a quantum of Indian blood.

There is dictum in the case of *Shaw* v. *Gibson-Zahniser Oil Corporation*, 276 U. S. 575, 72 L. ed. 709, which may appear to support the majority opinion of the Circuit Court. The following unfortunate language was used in that case:

> "The construction to be placed on these decisions is that the lands now in question, and hence the interest of the lessee in them are not such instrumentalities of the government as will be declared immune from taxation in the absence of an express exemption by congress * * *."

But since when has Congress ever had the power to confer immunity from taxation on a person by turning him into a Federal instrumentality, even though some Indian blood be involved? Whence came this Circe-like power? The commerce clause of the Constitution (Art. 1, Sec. 8), provides that Congress shall have power "to regulate commerce with foreign nations and among the several states, and with the Indian Tribes * * *." This is a far cry from granting exemption from state taxation to individuals without tribal status who happen to have a quantum of Indian blood.

On principle, the use of the concept "Federal instrumentality" in connection with individuals possessed of some Indian blood, constitutes an abuse no less serious than the use of the concept of "freedom of contract" in connection with certain regulatory measures. Neither of these two concepts are to be found in the Constitution. Both may, on occasion serve a useful purpose. The Supreme Court, as now constituted, has recognized that "freedom of contract" has too often been used to arrive at decisions which could not be sustained by the language of the Constitution or the logic of

events. The phrase "freedom of contract" has lost its place in the abracadabra of constitutional ritual, and societal control is no longer to be confined by such an incantation. Now let the jargon of legalistic conjuration be further delimited by stripping the "instrumentality" gloss from the simple constitutional reference to Indian tribes.

Upon the recurrent use in our case law of the term "federal instrumentality" we are moved to insert an observation in a recent (concurring) opinion by Mr. Justice Frankfurter (*Tiller* v. *Atlantic Coast Line Co.*, 87 S. Ct. No. 8, p. 454, wherein it was said:

> "• • • an excellent illustration of the extent to which uncritical use of words bedevils the law • • •. A phrase begins life as a literary expression; its felicity leads to its lazy repetition and repetition soon establishes it as a legal formula undiscriminatingly used to express different and sometimes contradictory ideas • • •."

Helvering v. *Mountain Producers Corp.*, 303 U. S. 376, 58 S. Ct. 623, 82 L. ed. 907, has pointed the way to rectification of the boundaries of tax exemption on lands affected by Indian rights. It has an indirect bearing on the present validity of the dictum in *Shaw* v. *Gibson-Zahniser Oil Corp.*, *supra*, to which reference has been made. That case involved land purchased for a full blood enrolled Creek Indian from the accumulated royalties of a departmental lease of his restricted and allotted lands. The court held that said lands were subject to ad valorem taxation and in the opinion rendered by Justice (now Chief Justice) Stone, the Court said:

> "In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in

this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. But they are far less intimately connected with the performance of an essential governmental function than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. To hold them immune would be inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility, and would present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility. There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks (citing cases)."

And in said case the Court further said:

"* * * Neither leases of * * * [restricted allotted or tribal] lands, Indian Territory Illuminating Oil Co. v. Oklahoma * * *, nor the exploitation of the land by the lessee, Howard v. Gypsy Oil Co. * * *, Large Oil Co. v. Howard * * *, Choctaw O. & G. R. Co. v. Harrison * * *, Jaybird Min. Co. v. Weir * * *, nor his income from the lease, Gillespie v. Oklahoma, * * *, may be taxed by the state."

But in *Helvering* v. *Mountain Producers Corp.*, *supra*, the Court said:

"We are convinced that the rulings in *Gillespie* v. *Oklahoma* * * *; and Burnet v. Coronado Oil & Gas Co., are out of harmony with correct principle and accordingly they should be, and they now are, overruled."

And further:

"We have always recognized that no constitutional implications prohibit a non-discriminatory tax upon the

property of an agent of the government merely because it is the property of such an agent and used in the conduct of the agent's operations and necessary for the agency."

And here is a point to be stressed: To hold, in *Helvering* v. *Mountain Producers Corp.*, *supra*, that certain cases were "out of harmony with correct principle," necessitated an outright overruling of those cases: but to hold that a certain dictum in *Shaw* v. *Gibson-Zahniser*, *supra*, is "out of harmony with correct principle," requires nothing so drastic. This is the very first time that this Court has had occasion to pass upon the power of Congress to render lands exempt from state taxation where tribal rights are not involved. The cases sustaining tax exemption have dealt with lands allotted to individuals out of tribal holdings, and those lands were exempt from taxation under treaties executed between the Indian tribes and the United States before Oklahoma acquired statehood. Naturally, Oklahoma entered upon statehood subject to vested treaty rights.

But questions of tribal lands and treaty rights do not arise in the case at bar. The landowner respondents are not enrolled in any Indian tribe. The mere fact that they are of Indian blood does not place them in any special constitutional category. The lands in question were taxable in the hands of their grantor's predecessor in title. The lands were purchased for their grantor out of her restricted Indian funds, not out of any funds belonging to them. To refer to these landowner respondents as "Federal instrumentalities" is

certainly the *reductio ad absurdum* of the "instrumentality" concept.

The majority opinion of the Circuit Court has stressed provisions in the Enabling Act and the Oklahoma Constitution which relate to Indian property rights and the authority of the United States to regulate such rights. Such provisions have no application here. They are to be read in the light of the conditions obtaining at the time of the admission of the State of Oklahoma into the Union.

At the time of the admission, a considerable amount of land within the boundaries of Oklahoma was subject to tax exemption by virtue of treaties made by the United States with Indian tribes. Naturally, the United States had no right to violate its treaty obligations. The United States had no right to make any agreement with Oklahoma that would impair those treaty obligations. Oklahoma knew what those treaty obligations were, and assumed the status of statehood with full knowledge of their provisions. Thus Oklahoma entered upon statehood subject to certain tax exemptions, the extent of which was clearly defined and well known to the Indians, the United States and Oklahoma. It was exemption of this character which has been many times upheld by the Supreme Court of the United States. *Choate* v. *Trapp*, 224 U. S. 665.

It must be emphasized that the tax exemption, under consideration at the time of the Enabling Act and the Oklahoma Constitution, attached to certain definite and specific

tribal lands. The fact that the ownership of such tribal lands was, at that time, in process of passing from ownership in common to ownership in severalty, is not material, because the change in character of ownership could not extend the boundaries of the tax-exempt land beyond the limits which had been agreed upon by the United States, Oklahoma and the Indians.

A specific tax exemption on specific lands, originally tribal in character, was the only type of tax exemption ever considered. It was the only type of tax exemption that could possibly be valid. It is important that this issue not be confused with the power of the United States to impose RESTRICTIONS on its Indian wards. The power of the United States to make judgments as to the degree of competence possessed by individual Indians cannot be challenged by a state. That is a matter between the United States and the individual Indian. That power is not dependent upon any acquiescence by a state in its Enabling Act or its Constitution; no state in the Union can escape its exercise. Oklahoma's situation in that respect is not inferior to the situation of any other state.

Never has the Supreme Court of the United States held that PURCHASED lands, other than those of a tribal character, could be rendered tax-exempt by mere fiat of Congress, simply because they were owned by an individual Indian, or because restricted funds of an Indian grantor were used in their purchase.

Prior to the passage of the 1936 and 1937 Acts of Congress the law seemed to be absolutely settled that lands such as are involved in this suit were subject to taxation by the State. *United States* v. *Ransome*, 263 U. S. 691; *McCurdy* v. *United States*, 246 U. S. 263; *United States* v. *Gray*, 284 Fed. 103; *Shaw* v. *Gibson-Zahniser Oil Corp.*, *supra*; *U. S.* v. *Mummert*, 15 Fed. (2d) 926.

In the case of *United States* v. *Wright*, 53 Fed. (2d) 300 (cited by respondents), the controlling issue was one of title. The district court had *assumed* that title to the land in question was held by individual Indians, but was reversed when the circuit court found that title was held by the United States in trust. Lands, title to which is in the United States, are of course exempt from state taxation. But when applied to a situation in which title is *actually held by individual Indians* (as in the case at bar) rather than the United States, the analysis made by the district court appears to be very sound. In that court, the case was styled *United States* v. *Swain County, North Carolina*, 46 Fed. (2d) 99, being an action to enjoin collection of taxes. Defendant county officers contended that the Act of Congress (43 Stat. 376) attempting to exempt said lands from taxation, was unconstitutional. In giving consideration to the following quotation from the district court opinion, it should be borne in mind that the circuit court, in reversing the case, neither criticized nor questioned the soundness of what here follows:

"Has Congress the power to exempt these lands from state and county taxes? * * * In the Articles of Confederation of 1777 the states were careful to give to the congress the power, only, to regulate 'trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated.' It is therefore clear that the states which banded themselves together and won their freedom from Great Britain understood that the lands within their borders, occupied by Indians, belonged to these individual states, and congress could only manage the affairs of the Indians and regulate their trade when such Indians were not members of any of the respective states * * *.

"In the well-considered case of *Union P. Railroad Co. v. Peniston*, 18 Wall. 29, 21 L. ed. 787, the Supreme Court of the United States, in an opinion by Justice Strong, well and clearly stated:

" 'That the taxing power of the state is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business and avocations existing or carried on within the territorial boundaries of the state, except so far as it has been surrendered to the Federal government, either expressly or by necessary implication, are propositions that have often been asserted by this court. And in thus acknowledging the extent of the power to tax lands belonging to the states, we have declared that it is indispensable to their continued existence * * *. And the Constitution contains no express restriction of this power other than a prohibition to lay any duty of tonnage, or any impost, or duty on imports or exports, except what may be absolutely necessary for executing the state's inspection laws * * *.

The states are, and they must ever be, coexistent with the National government. Neither may destroy the other. Hence the Federal Constitution must receive a practical

construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise.

"Counsel for complainant contends that the winding up of the tenancy in common of these Indians is in some way an instrumentality of the government, and he cites in support of that contention the famous case of *McCulloch* v. *Maryland*, 4 Wheat. 316, 436, 4 L. ed. 579; but I cannot find support for this contention in the opinion of Chief Justice Marshall in this famed case • • •.

"It will be seen that even in this case where an instrumentality of the government, to-wit, the United States Bank, owned real estate within the State of Maryland, the Chief Justice holds that the State of Maryland could levy a tax upon its real estate.

"In the case of Union P. Railroad Co. v. Peniston, referred to above, the Supreme Court held that although a railroad corporation chartered by Congress, which Congress assisted by donations and loans, of whose board of directors the government appoints two, and which makes annual reports to the government, and whose railroad and telegraph lines are subject to the regulations imposed by its charter, and subject to such further regulations as Congress may make, and to which the Congress has donated many millions of dollars, and to which Congress makes grants of land, and that said railroad should transmit dispatches and transport mails, troops and munitions of war, supplies and public stores for the government whenever required to do so by any department thereof, such corporation is not an instrumentality of the government to the extent that its real estate may not be taxed by the State of Nebraska. It cannot be argued with force that the ownership of a few thousand acres of mountain land in Swain County, N. C., by a small band of Indians, is in any sense an instrumentality of the government.

"• • • The land on which they now live, according to my conception, was never owned by the Federal govern-

ment, and the President and the Senate have never made any treaty with this band providing that their land should be exempt from state and county taxation. I cannot see, therefore, that the levying of taxes by Swain County on these lands at the same rates that other lands are assessed in that county can in any way be regarded as a tax burden on an instrumentality of the government of the United States * * *.

"* * * but the fact that they are wards of the government gives no more right to exemption from taxation than would be given to wards of other guardians scattered throughout North Carolina. There are many orphans throughout the state who have guardians, but the Federal government has no power to exempt their lands from taxation. There are many flood sufferers and earthquake victims throughout the United States and the world, to whose relief the Federal government has contributed money; but certainly it could not be argued that the lands which such sufferers might own within the boundaries of the various states could be exempted by the Federal government from state taxation. Surely it cannot be argued that an Indian or an Indian tribe or family could go into the various states either actually or by an agent, and purchase with personal funds rural lands or city lots and claim exemption from state taxation by reason of the fact that they are Indians. Nor could Congress exempt such lands from state taxation. *The particular character of a citizen of the United States or of a state does not take away from the several states the sovereign power of taxing his lands within their respective boundaries, unless such lands were donated, allotted, and set apart to such individual by the Federal government from and out of Federal lands or public domain* * * * (Italics ours).

"It is contended by counsel for complainant, in his brief, that:

"'From this legislation it is the policy of Congress where it is deemed necessary for the proper protection of the property of the Indians and the right of the United

States to supervise their property and affairs, to exempt their lands and property from taxation.'

"This statement is undoubtedly true with reference to all lands in the public domain which were assigned to Indians by the United States, but *I can find no instance in all the writings on Indian affairs, or in the multitude of judicial opinions, where the Congress has ever undertaken to exempt land from taxes where such land has been purchased by Indians, from the state, as in the case at bar* * * * (italics ours).

"For the foregoing reasons I am compelled to conclude and hold that the act of Congress of June 4, 1924, in so far as it attempts to exempt these Cherokee lands from state and county taxation, is unconstitutional and void."

Respondents are unenrolled Indians, without tribal status, who received the lands in question by gift from their mother, Wosey John Deere. And the lands were purchased out of the restricted funds of Wosey John Deere—not out of funds of respondents. Again, we assert that the Congress of the United States cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or property of an individual, merely because such individual is possessed of a quantum of Indian blood.

PROPOSITION II

The Act of Congress of June 20, 1936 (which deals with lands purchased out of an individual Indian's own restricted funds), and the Act of Congress of May 19, 1937 (which amends said 1936 Act by limiting it to homesteads), are not applicable to the lands here involved.

1. The Acts apply only to a "landless" Indian who had never held land prior to the purchase of property for him out of restricted funds; said Acts have no application to an Indian such as Wosey John Deere who was at all times possessed of a Creek allotment and who died on September 2, 1938, possessed of property valued at $359,643 (see minority opinion).

Because of the fact that so large a proportion of the Oklahoma Indians have been the beneficiaries of allotted lands, there has been a tendency to overlook the fact that large numbers of American Indians were not included in the treaties made by the United States with Indian tribes, relative to land distribution.

On behalf of certain American Indians who were "landless," a program of land purchase was entered upon some years ago. The Acts in question relate to that program. When the Act of June 20, 1936, was considered on the floor of the Senate, Senator Elmer Thomas referred to the program as follows:

> "• • • The Congress authorized the Secretary of the Interior to buy land for landless Indians. The Secretary proceeded to buy the lands and assigned the Indians to reside upon such lands" (Congressional Record for the Senate for June 6, 1936, page 9159).

However, the program ran into difficulties. Apparently, those in charge of it failed to make clear to the Indians the fact that the privilege of land ownership carried burdens such as taxes. Senator Thomas described the situation as follows:

"The recommendation or assertion was made to the Indians that the land would be theirs and they would have no taxes to pay * * *. In some cases tax warrants have been issued and the Indians have been threatened with dispossession. The department believes that in order to keep faith with the Indians, the tax warrants and tax assessments should be paid * * *. The bill [Act of June 20, 1936], authorizes the appropriation of money for that purpose" (Congressional Record, *supra*).

It has been observed that the majority opinion of the Circuit Court awarded recovery of 1937 ad valorem taxes to respondents because their grantor, Wosey John Deere, owned a life estate in the land on January 1 of that year, the date on which taxable status for the year was fixed.

And the following portions of the minority opinion of the Circuit Court have been quoted:

"The Creeks * * * could not properly be denominated landless Indians * * * Lands were allotted to their members * * *. Under * * * Acts of April 12, 1926, and May 10, 1928, Congress continued in applicable cases not only restrictions, but also non-taxability not exceeding 160 acres held by an allottee after April 26, 1931. That would cover the original allotted lands of Wosey John Deere (130 Fed. [2d] 682, 683).

* * * * * * * * * *

"The court takes judicial knowledge of the fact that the inherited restricted estate of Wosey John Deere in the custody of the Secretary of the Interior on September 2, 1938, amounted to $359,643, and the records show that these appellants were her heirs" (130 Fed. [2d] 685).

There was clearly no legislative intent to authorize tax exemption on land held by an Indian such as Wosey John Deere. It has been observed that the Act of June 20, 1936,

appropriated $25,000 to pay real property taxes for Indians. Certainly this was not done for the relief of an Indian who owned property valued at more than three hundred thousand dollars. It has been seen that Senator Elmer Thomas, sponsor of the legislation in question, informed the Senate that the legislation would apply only to land bought for "landless" Indians. But Wosey John Deere was not a "landless" Indian—she was the owner of allotted Creek land.

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2. The Act of June 20, 1936, limited tax exemption to * * * lands, the TITLE to which is now held by an Indian * * *, heretofore purchased out of trust or restricted funds of SAID Indian," and the Act of May 19, 1937, limited the tax exemption to HOMESTEAD lands. Since the land in question was purchased out of the funds of respondents' grantor rather than the funds of respondents, respondents cannot claim tax exemption.

It has been observed that respondents acquired fee simple title to the land in question on December 10, 1937, and that respondents designated the land as a homestead on December 16, 1937, under Act of May 19, 1937. The majority opinion of the Circuit Court awarded recovery of 1938, 1939 and 1940 ad valorem taxes to respondents because they owned the land on January 1 of each of those years, that being the date on which taxable status was fixed.

It would seem that the Act of May 19, 1937, was passed because the Act of June 20, 1936, had been found to be entirely too broad and indiscriminate. Much of the property

which had been bought for "landless" Indians was producing an income ample for the payment of taxes, and certain Indians deliberately allowed taxes to accumulate, relying on the bounty of the government. The circumstances demanded the imposition of a limitation. Said Senator Thomas:

> "Since the passage of said Act of June 20, 1936 (49 Stat. L. 1542), it was found the provisions of section 2 thereof * * * would exempt from taxation vast quantities of property such as * * * farm lands which are not homesteads, etc."

Therefore, section 2 of the Act of June 20, 1936, was stricken and a substitute section 2 was furnished for said Act by the amendment of May 19, 1937, containing the following provision:

> "Sec. 2. All homesteads heretofore purchased out of the trust or restricted funds of individual Indians are hereby declared to be instrumentalities of the Federal government and shall be non-taxable * * *. The Indian * * * shall select * * * either * * * lands * * * or city property * * * to be designated as a homestead."

There is every reason to assume that the 1937 Act was intended to be a limitation on the 1936 Act. There is no reason to assume that the 1937 Act was intended to extend and broaden the 1936 Act. Yet, the majority opinion of the Circuit Court held, in effect, that—while the 1936 Act made the tax exemption a personal right, limited to the person whose funds were used to purchase the land—the 1937 Act extended the tax exemption to subsequent takers of such land. Thus the majority opinion said:

"• • • Congress • • • on May 19, 1937, eliminated the ambiguity provoking language contained in the original act by declaring that all homesteads heretofore purchased with trust or restricted funds of an individual Indian, restricted against alienation without the approval of the Secretary of the Interior, were instrumentalities of the Federal government and exempt from all taxes • • •."

We are unable to see why the 1937 Act should be interpreted to render the land in question tax exempt in perpetuity. The tax exemption was, at most, designed to protect the individual Indian out of whose restricted funds the land was purchased. No evidence exists from which it can be assumed that there was any legislative intent to benefit grantees. On the floor of the Senate Senator Thomas, sponsor of the legislation in question, advocated passage of the 1937 Act in the following language:

"Since the passage of said Act of June 20, 1936 (49 Stat. L. 1542), it was found the provisions of section 2 thereof • • • would exempt from taxation vast quantities of property such as • • • *farm lands which are not homesteads, etc.*" (Congressional Record).

CONCLUSION

We recall that it was in only a few short years that Mr. Justice Stone was compelled to write memorable words of protest: "• • • The only check upon our own exercise of power is our sense of self-restraint." This was a counsel of restraint in dealing with Acts of Congress. In the case at bar, we pray that restraint be exercised in dealing with state taxation and exemption therefrom.

This is no trivial case. The very solvency of many Oklahoma counties and school districts may well be contingent upon the decision reached here. The Acts of Congress in question were interpreted by the court below to mean that, when restricted Indian funds are used to purchase a 160-acre homestead, the 160 acres are immune from state taxation, *even when they pass to persons who are not enrolled in any Indian tribe.* Restricted Indian funds are not so small but that they could be used in this fashion to remove a very significant proportion of Oklahoma property from the tax rolls.

Constructive efforts of the Federal Government, to function in a field of national concern, are no longer thwarted by this Court on the basis of any threadbare "states' rights" concept. But this appeal does not involve an attempt by Congress to regulate or control conditions which are beyond the effective power of the state. Nor does it involve an attempt by Congress "to regulate commerce with the Indian tribes" or to enforce treaties. This appeal deals with the power of Congress to deprive a state of the power to tax the lands of an American citizen of Indian blood where no treaty or tribal land is involved.

A great deal has been said in the cases about the guardianship to be exercised by Congress over its Indian wards. And, after many years of abuse and broken faith on the part of the Federal Government, it has been good to see the development of such a wholesome attitude. While there may be

those who would explain this new approach as the manifestation of a guilty conscience, we need not inquire into that here.

A large number of our present citizens of Indian blood are not enrolled in any tribe, and, in Oklahoma at least, tribal government is of little practical significance. Congress may feel, however, that many citizens of Indian blood—even though not enrolled in any tribe—are poor businessmen and unable to pay state taxes on lands (other than tribal lands) which they have acquired by inheritance, gift or purchase. And such a conclusion might not be without foundation (Peculiarly enough, the burden of taxes has been found an insuperable obstacle to retention of land by many citizens without a drop of Indian blood).

Now if Congress desires to shower its beneficence on such citizens of Indian blood, it probably needs no express constitutional authorization to do so. If Congress desires to appropriate the money necessary to pay the state taxes accruing on the property of such Indians, we have no desire to stand in the way. But we do vigorously protest when Congress expects its splendid manifestation of generosity to be paid for out of the Oklahoma pocketbook. If we are inclined to view with suspicion the tender expressions of solicitude for the Indian wards which have issued forth from the Congress and the Federal courts, we trust that our attitude is understandable. If there be any governmental responsibility for the plight of any of our citizens of Indian blood, then it is the responsibility of the forty-eight states collectively. We assert

that neither the Constitution nor reason afford any justification for interference with state taxation in this case.

It is, therefore, respectfully submitted that the decision of the United States Circuit Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,
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